

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ELLEN S. POLAND)	
Claimant)	
VS.)	
)	Docket No. 155,182
STATE OF KANSAS)	
Respondent)	
AND)	
)	
STATE SELF-INSURANCE FUND)	
Insurance Fund)	
AND)	
)	
KANSAS WORKERS COMPENSATION FUND)	

ORDER

Respondent and its self-insurance fund, along with the Kansas Workers Compensation Fund, appealed the October 3, 2000 Award entered by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on April 4, 2001, in Topeka, Kansas.

APPEARANCES

Robert E. Tilton of Topeka, Kansas, appeared for claimant. Scott M. Gates of Topeka, Kansas, appeared for respondent and its self-insurance fund. Jerry R. Shelor of Topeka, Kansas, appeared for the Kansas Workers Compensation Fund.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

This is a claim for an April 28, 1989 accident involving the right foot and ankle. On April 15, 1991, while attending a medical appointment for those injuries, claimant was allegedly sexually assaulted by a treating physician, and now alleges that the assault caused or aggravated psychological problems that now prevent her from working.

In the October 3, 2000 Award, Judge Benedict found that claimant was permanently and totally disabled from engaging in any substantial gainful employment because of the psychological problems that arose from the alleged sexual assault. The Judge also determined that claimant had intentionally concealed her psychological impairment when she was hired by respondent. Therefore, the Judge assessed liability against the Kansas Workers Compensation Fund for claimant's increased psychological problems but assessed liability against respondent and its self-insurance fund for the foot and ankle injuries.

The Kansas Workers Compensation Fund (Fund) appealed the Award to the Board, contending that Judge Benedict erred by finding it liable for any of the benefits awarded. But the Fund does not contest the Judge's conclusions that (1) the alleged assault was a compensable event under the Workers Compensation Act, (2) the assault resulted in a worsening of claimant's psychological state, or (3) claimant is now permanently and totally disabled from engaging in substantial gainful employment because of her psychological impairment.¹

Respondent and its self-insurance fund also appealed the Award. They contend Judge Benedict erred by finding the alleged assault compensable under the Workers Compensation Act and by finding claimant permanently and totally disabled. They argue that the assault incident is not compensable because (1) sexual assault is not a natural consequence of the original foot and ankle injuries; (2) the alleged assault was an intentional act and, therefore, not part of claimant's medical treatment; and (3) claimant's risk of being assaulted by the physician was not any greater than the risk borne by the general public. Further, respondent and its self-insurance fund contend the Judge erred by finding that claimant's psychological impairment is related to the alleged assault and by finding that claimant was entitled to receive permanent total disability benefits.

The issues before the Board on this appeal are:

1. Is an assault by a treating physician during an appointment to treat a work-related injury a compensable event under the Workers Compensation Act?
2. If so, did the assault cause additional psychological problems or aggravate claimant's preexisting psychological state?
3. If so, did claimant's psychological state worsen to the extent that she is now unable to engage in any substantial gainful employment?
4. What is the liability of the Kansas Workers Compensation Fund?

¹ On page 3 of the Reply Brief of Workers Compensation Fund, the Fund states: "The sexual assault . . . is compensable. Claimant is totally disabled. Claimant's condition did not rise to an impairment prior to the . . . incident. The claimant did not 'knowingly' misrepresent her condition."

FINDINGS OF FACT

After reviewing the entire record, the Board finds:

1. On April 28, 1989, claimant injured her right foot and ankle while working for the Kansas Department of Transportation. On April 15, 1991, while attending an authorized appointment for medical treatment for the work-related injury, claimant was allegedly sexually assaulted by the physician.
2. Claimant, who was approximately 40 years old at the time of the 1989 accident, has not worked for another employer since that accident. But it is claimant's panic disorder and agoraphobia (the overwhelming symptoms of anxiety, often leading to panic attacks), instead of her physical injuries, that is limiting her ability to work.
3. The parties do not contest that claimant's foot and ankle injuries are compensable under the Workers Compensation Act. The parties also do not contest that claimant was sexually assaulted while seeking medical treatment for the foot and ankle injuries.
4. Claimant began working for respondent in approximately May 1986. At that time, respondent asked claimant to answer a health questionnaire. One of the questions asked was, "Have you ever had a mental disease or disorder?", to which claimant answered "no."
5. Claimant has received psychiatric treatment for a chronic anxiety disorder since at least 1973. The record contains notes and letters from claimant's psychiatrist, Dr. Stephen E. Shelton, which indicate claimant's emotional state adversely affected her ability to work long before the 1989 accident. Claimant was unable to work in most conventional work settings because she would be overwhelmed with anxiety. But, from time to time, claimant would find jobs that she could perform as she felt both secure and that she had a good relationship with her supervisor.
6. Despite her chronic anxiety disorder, claimant was able to work for respondent. But following the April 1991 assault, claimant's emotional problems significantly worsened. According to Dr. Shelton, the assault caused claimant's agoraphobia, post-traumatic stress disorder, and panic attacks, preventing her from working.
7. Dr. G. R. Wurster, a psychiatrist who was selected by the Judge to perform an independent evaluation, saw claimant in August 1998 and diagnosed panic disorder with agoraphobia. The doctor also found that claimant had a generalized anxiety disorder, from which she still suffers, and a past history of major depression. The doctor believes the assault increased claimant's total impairment by five percent. Although Dr. Wurster believes that claimant now has a 40 percent psychiatric impairment, he still believes that claimant could work. But the doctor believes that claimant's agoraphobia does not prevent her from leaving her home, which is contrary to the greater weight of the evidence as established by the testimonies of Dr. Shelton, claimant's husband, and Gayle Rich (claimant's friend).

8. The parties also deposed Dr. Harold M. Voth, the psychiatrist hired by respondent's self-insurance fund to evaluate claimant. The doctor initially believed that claimant's psychological state was directly related to the assault. But after learning more of claimant's history, the doctor changed his opinion and testified that neither the foot and ankle injuries, nor the assault, has any relationship to claimant's current emotional state. According to Dr. Voth, claimant has longstanding emotional problems and she may well have deteriorated over time.

9. The Board finds the greater weight of the evidence indicates that the 1991 assault worsened claimant's psychological condition as it either exacerbated or caused claimant's panic disorder and either caused or aggravated claimant's agoraphobia. Because of the assault and her worsened emotional state, claimant is now afraid to leave her home without being accompanied by someone she trusts.

CONCLUSIONS OF LAW

1. The Award should be affirmed.

2. The alleged assault is a compensable event under the Workers Compensation Act as it occurred as part of the medical treatment administered to claimant's physical injuries. Similar to the *Roberts*² case, claimant's work-related injury was the cause of claimant being exposed to the risk of the doctor's malpractice. The April 28, 1989 work-related accident "set the causation ball rolling which resulted in the additional permanent injury." The *Roberts* Court said:

The on-the-job injury was the cause of plaintiff being exposed to the risk of malpractice. . . .

. . .

. . . the initial job-caused injury set the causation ball rolling which resulted in the additional permanent injury.³

. . .

After careful consideration, we conclude:

1. Where an injury is compensable under the Workers Compensation Act (K.S.A. 44-501 *et seq.*), any aggravation of that injury or additional injury arising from medical malpractice in the treatment thereof is a consequence of the primary injury and compensable under the Act. . . .

² *Roberts v. Krupka*, 246 Kan. 433, 790 P.2d 422 (1990).

³ *Roberts, supra*, pp. 441, 442.

2. Where an employer has paid workers compensation benefits to an injured worker which are attributable to aggravation of the primary injury or an additional injury arising from medical malpractice in the treatment of the primary injury . . . [the Act] grants subrogation rights to the employer and its insurance carrier to recoup such sums from any recovery by the injured worker from the negligent health care provider.⁴

Contrary to the argument voiced by respondent and its self-insurance fund, for purposes of the Workers Compensation Act there is no apparent reason to treat medical malpractice that is founded upon a negligent act from medical malpractice that is founded upon intentional misconduct.

3. The 1991 assault by the authorized physician is also compensable under the Act for a second reason. The referral to the physician placed claimant at an increased risk to be subjected to the doctor's advances than that experienced by the general public. In *Hensley*⁵ and *Orr*,⁶ the Kansas Supreme Court and Kansas Court of Appeals, respectively, applied the doctrine of increased risk and found the employees' injuries compensable under the Act.

In *Hensley*, the decedent was killed by sniper fire while installing glass on a roof near the sniper. The claim for decedent's death was held compensable as the Court reasoned that claimant's job placed him at greater risk than the general public. In *Orr*, claimant was attacked when she took a break from her job and went to the restroom. The Court found the claim compensable as the claimant was exposed to increased risk of attack by virtue of the hotel being in a high-crime area. The Court stated:

The more difficult question is, did the injury of the appellant arise "out of" her employment? A personal attack is obviously not part of the appellant's prescribed duties. Is her injury fairly traceable to her employment and is there a causal connection apparent to the rational mind because of the nature, conditions, obligations and incidents of the employment? We believe that the injury of this appellant does meet the test as previously set out by the court. Appellant was exposed to attack by virtue of being in a high-crime area at night for purposes of her employment. The general public was not so exposed. **The general public must be viewed as a broader**

⁴ *Roberts, supra*, pp. 442, 443.

⁵ *Hensley v. Carl Graham Glass*, 226 Kan. 256, 597 P.2d 641 (1979).

⁶ *Orr v. Holiday Inns, Inc.*, 6 Kan. App. 2d 335, 627 P.2d 1193, *affirmed* 230 Kan. 271, 634 P.2d 1067 (1981).

cross-section of the community than that group of people who happen to be in this dangerous area of the city at night.⁷ (Emphasis added.)

Following the guidance of *Orr*, in this claim the general public must be viewed as a broader cross-section of the community than those people who happened to have medical appointments with the doctor who assaulted claimant.

4. The Board finds and concludes that before the 1989 foot and ankle injuries and the 1991 assault claimant experienced both depression and anxiety disorder. But before the foot and ankle injuries and assault, the symptoms from those disorders were being controlled by medication and claimant was able to work and maintain an active social life. The greater weight of the evidence establishes that the foot and ankle injuries and assault worsened claimant's emotional state. The Board concludes that it is more probably true than not that claimant is now permanently and totally disabled from engaging in any substantial gainful employment as the result of that worsened emotional state.

5. Before liability can be assessed against the Fund, an employer must prove that it either hired or retained a worker in its employment despite having knowledge that the worker had an impairment that constituted a handicap.⁸ But knowledge is conclusively presumed if the worker knowingly misrepresents his or her emotional or physical condition. The Act provides:

Knowledge of the employee's preexisting impairment or handicap at the time the employer employs or retains the employee in employment shall be presumed conclusively if the employee, in connection with an application for employment or an employment medical examination or otherwise in connection with obtaining or retaining employment with the employer, knowingly: (1) Misrepresents that such employee does not have such an impairment or handicap; (2) misrepresents that such employee has not had any previous accidents; (3) misrepresents that such employee has not previously been disabled or compensated in damages or otherwise because of any prior accident, injury or disease; (4) misrepresents that such employee has not had any employment terminated or suspended because of any prior accident, injury or disease; (5) misrepresents that such employee does not have any mental, emotional or physical impairment, disability, condition, disease or infirmity; or (6) misrepresents or conceals any facts or information which are reasonably related to the employee's claim for compensation.⁹

⁷ *Orr, supra*, pp. 339, 340.

⁸ K.S.A. 1988 Supp. 44-567(a), (b).

⁹ K.S.A. 1988 Supp. 44-567(c).

A handicapped individual is defined as one who is afflicted with an impairment of such character that it constitutes a handicap in obtaining or retaining employment.¹⁰

6. Before liability can be assessed against the Fund, the employer must also prove that (a) the handicapped worker sustained a work-related injury or disability that probably or most likely would not have occurred but for the preexisting physical or mental impairment¹¹ or (b) if the work-related injury probably would have occurred regardless of the preexisting impairment, the preexisting impairment contributed to the disability resulting from the work-related injury.¹²

7. The Board affirms the Judge's conclusion that the Kansas Workers Compensation Fund is responsible for claimant's worsened emotional state. The greater weight of the evidence indicates that at the time claimant completed the health questionnaire for respondent she knowingly misrepresented her preexisting emotional and psychological problems despite her knowledge, among other facts, that she needed ongoing treatment for those problems and that her emotional state hindered her ability to work.

8. The Board also finds and concludes that claimant would not have been rendered permanently and totally disabled but for her preexisting psychological impairment.

9. The Board adopts the findings and conclusions set forth in the Award to the extent they are not inconsistent with the above.

AWARD

WHEREFORE, the Board affirms the October 3, 2000 Award entered by Judge Benedict. Respondent and its self-insurance fund are responsible for all the medical treatment administered for the right foot and ankle injuries. Further, respondent and its self-insurance fund are responsible for the temporary total disability benefits due claimant for the period from April 28, 1989, through April 14, 1991. The Kansas Workers Compensation Fund is responsible for the psychiatric treatment administered to claimant commencing April 15, 1991; the temporary total disability benefits due claimant commencing April 15, 1991; and the permanent total disability benefits.

Claimant may request future medical benefits by making proper application to the Director.

The Board adopts the remaining orders set forth in the Award that are not inconsistent with the above.

¹⁰ K.S.A. 44-566 (Ensley).

¹¹ K.S.A. 1988 Supp. 44-567(a)(1).

¹² K.S.A. 1988 Supp. 44-567(a)(2).

IT IS SO ORDERED.

Dated this ____ day of June 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Robert E. Tilton, Topeka, KS
Scott M. Gates, Topeka, KS
Jerry R. Shelor, Topeka, KS
Bryce D. Benedict, Administrative Law Judge
Philip S. Harness, Director